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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JAMES DEKALB,<br>Defendant and Appellant. | A151343<br><br>(Solano County<br>Super. Ct. No. FCR313539) |

James Dekalb broke into his grandparents' home and stole guns, jewelry, electronics and his grandfather's pickup truck. A jury convicted him of burglary, theft and firearms charges. He contends the court should have suppressed evidence found during a warrantless search of his backpack; the evidence was insufficient to prove he acted with the mental states required for conviction; and the court misinstructed the jury on the use of circumstantial evidence. Dekalb also contends the court erroneously admitted evidence about an earlier crime under Evidence Code section 1101, subdivision (b), and that a purported failure by counsel and the court to correct false testimony deprived him of a fair trial. None of Dekalb's contentions are meritorious, so we affirm the judgment.

## BACKGROUND

### A. The burglary

On March 15, 2015, Dekalb's grandparents Larry and Nadine Dekalb were on vacation when a neighbor called to let them know Larry's pickup truck was missing from

their driveway.[1] Nadine called her son Jeffrey, Dekalb's father, who drove to his parents' home. Larry's pickup truck was gone and a security door on the attached garage was torn open. A 12 to 15-inch section of metal screen had been pried away from the door frame, leaving a gap large enough for someone to reach keys that were hanging from a hook on the inner door. Jeffrey called the police.

Three days later Fairfield police found the stolen truck parked in downtown Fairfield. In it were a laptop computer and three rifles that had been stolen from Larry and Nadine's home.

When Larry and Nadine returned from vacation on March 19 they discovered that these and other items were missing from their home including the keys to their house and Larry's truck, watches, jewelry, a coin bank, a laptop charger and a .22-caliber Ruger convertible revolver. The total value of the stolen items was between $4,500 and $4,750.

**B. The Arrest**

On March 20, 2015, Fairfield Police Officer Nicholas McDowell responded to a report of a person acting erratically, yelling and banging on windows. He found Dekalb sitting on the sidewalk behind some planter boxes, rummaging through a backpack. When Officer McDowell approached, Dekalb offered to sell him methamphetamine. This, as well as Dekalb's fidgety movements, difficulty following directions, verbal outbursts, rapid speech, and inability to cooperate with an examination indicated that Dekalb was under the influence of methamphetamine.

Officer Cole Spencer was dispatched to assist Officer McDowell. When he arrived Dekalb was sitting on a planter box talking with McDowell. McDowell informed Spencer that Dekalb had asked if he wanted to buy methamphetamine. Based on Dekalb's statements and "fidgety, kind of nonsensical" behavior, Officer Spencer handcuffed and searched him but found no methamphetamine. Officer McDowell told Spencer about the backpack Dekalb had been going through, which was now about 10

[1] To avoid confusion, we will refer to several members of the Dekalb family by their first names. We intend no disrespect by this practice.

feet away. Officer Spencer unzipped the backpack and found a loaded .22-caliber Ruger revolver, a watch, and various pieces of jewelry. Nadine later confirmed that the gun and jewelry belonged to her and her husband.

In April 2016 Dekalb wrote to his father from jail that he "wasn't planning on doing all the damage I did, but just to take one of the guns."

### C. Mental Illness

DeKalb was raised primarily by his father, but he spent a lot of time at his grandparents' home. When he was 19 he was diagnosed with schizophrenia. Within the following year he moved out of his father's home because, as Jeffrey testified, "it just got too hard to handle." After that he was either homeless or in a halfway house or drug rehabilitation program. Jeffrey gave Dekalb food when he came to the door, but did not allow his son in his home. Dekalb used marijuana and was a heavy drinker.

Jeffrey found it impossible to communicate with Dekalb during his schizophrenic episodes. He testified, "you can't talk to him. And he's just, you know, only word to come up with is crazy." Usually when Dekalb's episodes occurred Jeffrey would have to call the police or tell his son to leave. But they occurred during only 10 to 15 percent of Jeffrey's contacts with Dekalb, and the rest of the time Dekalb seemed normal and intelligent. His episodes were usually triggered by someone confronting or disagreeing with him, when he was under pressure or nervous, or had not taken his medication. He could become delusional, adopting the persona of rapper Tupac Shakur and going into what his father described as "thug mode." When he was around 19 Dekalb told his family he was Jesus Christ.

Until 2011 or 2012 Nadine and Larry would occasionally let Dekalb shower and spend the night at their house, but after that they stopped allowing him in their home. When asked why, Jeffrey explained that Dekalb had stolen Larry's pickup truck.[2] On that occasion Jeffrey spotted Dekalb driving Larry's truck, followed him to Larry and Nadine's house, chased him down and tackled him, and retrieved Larry and Nadine's

[2] As we discuss in section IV, *post*, the date of this first auto theft is unclear from the record.

house and car keys from Dekalb's pocket. At the time, Dekalb did not appear to be having one of his episodes and seemed normal. A watch and ring were missing from Larry and Nadine's home. Jeffrey found a video camera in their living room that showed Dekalb posing in the mirror with Larry's Ruger revolver, one of the guns he also stole in this case. Larry always kept the Ruger loaded in the drawer of his bedside stand.

Dekalb was no longer welcome in Larry and Nadine's home after that incident "[b]ecause he just had caused us so much heartache, so much trouble . . . . [W]e actually feared for our safety." Nadine would still converse with her grandson, but on two occasions one of his episodes was triggered after she refused to let him in the house or to drive him to Sacramento.

On the morning of March 15, 2015, Dekalb came to Jeffrey's house and asked for food. Jeffrey gave him food, but Dekalb threw it in the bushes. When Jeffrey confronted him Dekalb "got all aggravated and stomped off down the street and yelling stuff down the neighborhood, all the way down the road. [¶] . . . [¶] Foul, bad stuff."

**D. Defense Case**

Psychologist Andrew Pojman testified as an expert in clinical psychology and psychological assessment. Dr. Pojman reviewed Dekalb's medical records and the police reports and videotape of his arrest, met with him twice, and administered various tests. The tests revealed intelligence in the low average range and notable deficits in executive functioning. Dekalb's diagnosis is schizoaffective disorder, bipolar type. When not on medication he becomes disorganized and is likely to present delusional thinking. Methamphetamine and alcohol generally exacerbate the symptoms of schizophrenia or schizoaffective disorder, including delusional thinking.

Dr. Pojman thought Dekalb's behavior around Officers Spencer and McDowell displayed symptoms of psychosis, most notably his apparent failure to perceive they were police officers and soliciting a drug transaction. His nonsensical speech, parroting back the officer's request to remove his shoes, and distracted behavior indicated psychosis, although it was also possible that Dekalb was under the influence of a substance. Dekalb's belief when he was arrested that his cell phone was a marijuana pipe and that he

was from "County Jail" was consistent with a "delusional space of like he was this cool dude, drug guy." This was different from how DeKalb appeared when Dr. Pojman interviewed him or in the letter he wrote his father from jail, when he was medicated. Dekalb was more socially appropriate and presented better during his interviews, and his letter was organized, clear and displayed some insight.

Dr. Pojman opined that a hypothetical delusional homeless person with schizoaffective disorder would be able to find a familiar house, retrieve keys from a hook, and find and remove items from drawers or cupboards without making a mess. Asking for food and then throwing it into the bushes could indicate the person was delusional. Such a person could drive a car while delusional, could believe the car belonged to them, and could think they had the right to be somewhere they did not.

The jury convicted Dekalb of possession of a firearm by a felon, possession of a concealed firearm by a felon, carrying a loaded firearm, first degree residential burglary, receiving stolen property, vehicle theft and theft from an elder. The court dismissed a charge of receiving stolen property pursuant to Penal Code section 496, subdivision (a). Dekalb was sentenced to a total prison term of six years and eight months. This appeal is timely.

## DISCUSSION

### I. The Warrantless Search

Dekalb asserts the search of his backpack violated the Fourth Amendment because the officers failed to obtain a warrant and the search was not justified under the "search incident to arrest" exception to the warrant requirement. Accordingly, he maintains, the court erred when it denied his motion to suppress the .22 revolver found in his backpack. While the search cannot be justified as incidental to Dekalb's arrest, we disagree that the court erred in denying the motion to suppress.

" 'A defendant may move to suppress evidence on the ground that "[t]he search or seizure without a warrant was unreasonable.' " [Citation.] A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.] "The standard of appellate review of a trial

court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." ' " (*People v. Suff* (2014) 58 Cal.4th 1013, 1053.) We affirm the trial court's ruling if it is correct on any applicable legal theory, even if for reasons different than those given by the trial court. (*People v. Evans* (2011) 200 Cal.App.4th 735, 742.)

Dekalb argues the search was not justified as a warrantless search incident to his arrest because the backpack was not within his immediate control at the time. (See *People v. Macabeo* (2016) 1 Cal.5th 1206, 1214 [search incident to arrest limited to area from which arrestee might gain access to weapon or destroy evidence].) So far, we agree. When Officer Spencer conducted the search DeKalb was handcuffed and under Officer McDowell's supervision seated about 10 feet away from the backpack. He therefore had no access to or control over it, so this exception to the warrant requirement does not apply.

Even so, the motion to suppress was properly denied on another ground. The revolver would inevitably have been discovered during an inventory search following Dekalb's arrest on drug charges. The inevitable discovery doctrine "acts as an exception to the exclusionary rule and permits the admission of otherwise excluded evidence 'if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police.' " (*People v. Hughston* (2008) 168 Cal.App.4th 1072, 1071.) The test is not whether the police would have certainly discovered the tainted evidence. Rather, it is only necessary for the prosecutor to show a reasonably strong probability that they would have. (*People v. Superior Court* (*Tunch*) (1978) 80 Cal.App.3d 665, 681.) In deciding whether the inevitable discovery exception applies, we determine, viewing the circumstances as they existed at the instant before the unlawful search, what would have happened had the unlawful search not occurred. (*People v. Hughston, supra,* 168 Cal.App.4th at p. 1072.)

In this case Officer McDowell saw Dekalb rummaging through his backpack when he first contacted him. Dekalb appeared to be under the influence of methamphetamine, offered to sell the officers "tina" or "crank," and responded affirmatively when asked if he had any in his possession. Officer Spencer handcuffed Dekalb based on this exchange. Plainly, then, Dekalb was to be arrested for drug offenses before the officers searched his backpack and found the gun. The backpack would have been seized upon his arrest and its contents would inevitably have been inventoried during a booking or inventory search. (*Illinois v. Lafayette* (1983) 462 U.S. 640, 648 [upholding inventory search of arrestee's shoulder bag].) "[I]t is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." (*Ibid*.) The gun and other items found in the backpack were properly admitted at trial.

## II. Substantial Evidence

DeKalb contends on the basis of his "disordered thinking, delusions, and generally being out of touch with reality" that there was insufficient evidence to prove he acted with the mental states required for conviction on any of the charges against him. In regard to the gun offenses he maintains there was insufficient evidence to prove he knew that: (1) he possessed a firearm; (2) he had been convicted of a felony; or (3) he was carrying a firearm and that it was concealed and loaded. As to burglary and theft, he contends the evidence was insufficient to prove he intended to permanently or temporarily deprive his grandparents of property; knew the property was not his and that he lacked their consent to take it; or knew or should have known the owner was an elder. In his view, the evidence failed to rule out a reasonable doubt that his psychosis negated the knowledge and intent elements of the charged offenses. We disagree.

"When an appellant attacks the sufficiency of the evidence to support a conviction, this court must examine the entire record in the light most favorable to the judgment below and presume in support of the judgment the existence of every fact that can reasonably be deduced from the evidence. [Citation.] Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. [Citation.] If

the circumstances reasonably justify the findings of the trier of fact as to each element of the offense, an opinion of the reviewing court that the circumstances might also lead to a contrary finding does not warrant reversal." (*In re Leland D.* (1990) 223 Cal.App.3d 251, 258; *People v. Zamudio* (2008) 43 Cal.4th 327, 358.)

The importance of circumstantial evidence to prove intent in this case does not change the standard of review. "The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. [Citation.] Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendan's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) We therefore reject Dekalb's implicit suggestion that *this court*, rather than the jury, must find the evidence was irreconcilable with an innocent interpretation. Our inquiry, rather, is whether on this record the jury reasonably could have so found. As in other circumstances, "the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination of whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, which will support the decision of the trier of fact." (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1373.)

Dekalb's argument that a rational jury could not rule out an innocent interpretation of the evidence beyond a reasonable doubt is premised on Dr. Pojman's testimony that it "could be very difficult" to know what a schizophrenic person is thinking at any given time. Dekalb argues that "given that appellant was often delusional, acted psychotic the day of the takings and irrationally during and after them, and was clearly delusional at the time of his possession of the firearm, it was the prosecution's burden to prove appellant was *not* . . . 'acting under the power of a delusion' during the alleged offenses." This, he maintains, was "an uphill battle, one the prosecutor could not win."

We disagree. As the People observe, Dekalb *admitted* in his letter to Jeffrey that he " 'wasn't planning on doing all the damage I did but just to take one of the guns.' " His admission that he planned to take one of Larry's guns is direct evidence that Dekalb

entered his grandparents' home with the intent to commit theft. The evidence that he previously broke into the house, stole similar items, and videotaped himself brandishing the same revolver stolen during the charged burglary supplied a strong inference that he harbored the same intent and knowledge this time around. Larry and Nadine's testimony that Dekalb was no longer allowed into their home after the first burglary is evidence he understood he had no right to enter the home, as did the glaring fact that he pried the metal screen off the security door to gain entry.

Dekalb further contends the evidence was insufficient to prove he understood there was a gun in his backpack when he was arrested and charged with its possession. This is also meritless. Dekalb admitted in writing *that he planned to steal Larry's gun*—the same gun that was in his backpack when he was arrested. He attempts to discount the significance of his admission by arguing his letter to his father reflects only his mental state on the day of the burglary, not when he was arrested five days later, but the jury could reasonably reject such a constricted view of the evidence as unreasonable—particularly given that Dekalb was observed rummaging through the backpack moments before his arrest.

Reviewing the evidence under the proper standard, we are also unpersuaded that evidence of the nature and severity of Dekalb's mental illness precluded the jury from ruling out a reasonable doubt that he understood at the relevant times that (1) he had previously been convicted of a felony; (3) his grandparents were "elders" within the meaning of Penal Code section 368, subdivision (d)[3]; (3) he was unwelcome in their home; or (4) he had no right to take their belongings. The evidence before the jury, including Dekalb's letter from jail and evidence of the earlier burglary, was sufficient to reasonably eliminate an innocent interpretation beyond a reasonable doubt. Dekalb also argues there was no evidence he knew the gun was loaded, but knowledge that a firearm

[3] Penal Code section 368, subdivision (d) penalizes any non-caretaker who "violates any provision of law proscribing theft . . . with respect to the property . . . of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult."

is loaded is not required for conviction of carrying a loaded firearm in violation of Penal Code section 25850. (*People v. Dillard* (1984) 154 Cal.App.3d 261, 266 [construing former section 12031, the predecessor to Penal Code section 25850]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1514, fn. 3.) The mental state elements of the convictions are supported by substantial evidence.

## III. CALCRIM No. 225

Dekalb contends the trial court erred when it failed to instruct the jury the circumstantial evidence had to be irreconcilable with innocence to justify a conviction. The People contend Dekalb forfeited the argument when defense counsel affirmatively agreed the jury should be instructed with CALCRIM No. 225, the pattern instruction on the subject. Generally, " '[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.' " (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165; accord, *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Dekalb asserts he was not required to request clarification because the instruction actually given is not correct in law. (See *People v. Franco* (2009) 180 Cal.App.4th 713, 719 ["rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law [citation], or if the instructional error affected the defendant's substantial rights"].) We will address Dekalb's argument, but disagree the instruction is legally incorrect.

We review the instruction independently. (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.) " 'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.] The absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. [Citation.] Further, in examining the entire charge we assume that jurors are ' " ' "intelligent persons and capable of understanding and

correlating all jury instructions which are given." ' " ' " (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

In *People v. Bender* (1945) 27 Cal.2d 164 (*Bender*), overruled on another point in *People v. Lasko* (2000) 23 Cal.4th 101, 110, the Supreme Court stated that in cases involving circumstantial evidence a jury should be instructed with the principle that " 'to justify a conviction, the facts or circumstances *must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion*.' " (*Id*. at p. 175, italics added.) Moreover, " '[n]either the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction." (*Id*. at pp. 175-176.)

In this case the jury was instructed with CALCRIM No. 225, as follows: "The People must prove not only that the defendant did the act charged, but also that he acted with a particular intent or mental state. The instruction for each crime explains the intent or mental state required. The intent or mental state may be proved by circumstantial evidence. Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence, is that the defendant had the required intent or mental state. [¶] If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports the finding that the defendant did not, you must conclude that the required intent or mental state was not proved by the circumstantial

evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." Dekalb maintains this pattern instruction conflicts with *Bender* because it does not expressly state that the jury could not convict unless the circumstantial evidence was inconsistent with any rational conclusion other than guilt. We disagree.

Our Supreme Court "has long held that when the prosecution's case rests substantially on circumstantial evidence, trial courts must give 'an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.' " (*People v. Livingston, supra,* 53 Cal.4th at p. 1167.) The trial court did so when it instructed the jury with CALCRIM No. 225 that "before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that *the only reasonable conclusion* supported by circumstantial evidence is that the defendant had the required intent or mental state." (Italics added.) No reasonable jury would interpret this language to allow conviction if it could draw multiple reasonable inferences from the circumstantial evidence, one of which points to innocence. "Words of equal import may be substituted if the principle is substantially but clearly and fairly set forth." (*People v. Navarro* (1946) 74 Cal.App.2d 544, 550.) None of the authority cited by Dekalb suggests otherwise. (See, e.g., *People v. Kinowaki* (1940) 39 Cal.App.2d 376, 380 [trial court erred in refusing to give *Bender* instruction or "its equivalent"]; *People v. Koenig* (1946) 29 Cal.2d 87, 93; *People v. Rayol* (1944) 65 Cal.App.2d 462, 465-466; *Bender*, *supra*, 27 Cal.2d at p. 177.) CALRIM No. 225 correctly stated the law, and, for that reason, Dekalb forfeited his claim of error on the point.

**IV. Evidence of the Prior Break-in**

Dekalb contends the court committed a prejudicial abuse of discretion when it admitted evidence of his prior burglary and theft from Larry and Nadine. In a related argument he asserts Jeffrey's uncorrected testimony that implied there had also been a third break-in deprived him of a fair trial. Neither argument is persuasive.

A. Background

The prosecutor moved in limine to introduce testimony about Dekalb's previous burglary and theft from his grandparents that occurred about three years before the charged offenses pursuant to Evidence Code section 1101, subdivision (b). The court ruled the evidence was admissible to show intent and knowledge and was not unduly prejudicial. In response to an objection that the prosecutor had not timely disclosed the proffered evidence, the court allowed defense counsel to defer cross-examination on the prior incident so she would have time to prepare.

Jeffrey testified at trial that he was not sure when the prior burglary had occurred but suggested it was in 2000, 2001 or 2002. Later he testified the incident was "probably more like 2003 to 2005." Larry testified he "guess[ed]" the prior theft was in 2003 or 2004. Nadine thought it probably occurred in 2005 or 2006.

During Larry's testimony, defense counsel renewed her objection to the other crimes evidence based on the new information that the prior incident occurred much more than three or four years before as the prosecutor had represented, and that she had not been provided enough notice to investigate it.[4] The court acknowledged the event was "a little more remote than I originally understood," but reaffirmed its ruling that the evidence was not unduly prejudicial. Jeffrey and his parents testified about the earlier burglary and theft.

**B. Analysis**

We review the court's ruling for abuse of discretion. (*People v. Kipp*, (1998) 18 Cal.4th 349, 371 (*Kipp*).) "Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the

[4] The prosecutor explained that Dekalb's family members had told her the first burglary occurred some four years earlier. Jeffrey confirmed that he now believed it occurred around 2004, and apologized to the court for having been confused about the dates.

existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.]" (*Id.* at p. 369.) To establish relevance on the issue of intent, the uncharged crimes need only be " 'sufficiently similar [to the charged offenses] to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' [Citations.]" ' " (*Id.* at p. 371.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Accordingly, numerous decisions have upheld the admission of prior burglaries as relevant to prove the defendant possessed the intent to steal. (*People v. Rocha* (2013) 221 Cal.App.4th 1385, 1393 [citing collected cases].) We do so here, where the two burglaries were remarkably similar, and the question of defendant's mental state was the primary contested issue at trial.

Nor did the trial court abuse its discretion when it found the evidence's probative value was not outweighed by its potential for undue prejudice. (See *Kipp, supra,* 18 Cal.4th at p. 371.) "The governing test . . . evaluates the risk of '*undue*' prejudice, that is, ' "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues," not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, italics added, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) As the Supreme Court noted in *Kipp*, "prejudice of this sort is inherent whenever other crimes evidence is admitted [citation], and the risk of such prejudice was not unusually grave here." (*Kipp, supra,* at p. 372.) Here, as in *Kipp,* the evidence implicating defendant was strong, the prior offense was not any more inflammatory than the charged offense, and the jury was instructed to consider the evidence only for intent and not for any improper purpose. (*Ibid*.) In these circumstances the court reasonably determined the probative value of the challenged evidence outweighed any risk of undue prejudice.

Lastly, Dekalb asserts he was deprived of a fair trial because neither the prosecutor, the trial court nor his own attorney clarified testimony he contends gave the

false impression that Larry and Nadine's home had been burglarized yet a third time. The following exchange occurred while the prosecutor questioned Jeffrey about the prior burglary: "Q. On the same day when you returned the items to your parents, did you notice anything about the house in regard to an entry being broken into? [¶] A. No. [¶] Q. And was there—was there a time in which their bedroom had been broken into? [¶] A. Yes. [¶] Q. When was that? [¶] [Defense Counsel]: I object. [¶] THE COURT: Folks, let me do this since I'm not sure where this evidence is headed. I'm going to excuse you for a couple of minutes. [¶] . . . [¶] I ask the witness to remain and flush this out, see whether this is admissible or not. " After the jury left the courtroom, Jeffrey clarified that his answer referred to the same prior burglary, not some third incident.[5]

While the cited testimony was arguably ambiguous, we do not agree with Dekalb's claim, asserted for the first time on appeal, that it clearly referred to a third break-in. Larry testified that he always kept the Ruger in his bedroom, so we see no reason to believe the prosecutor's mention that Larry and Nadine's bedroom had been broken into implied there was yet a third burglary. There was no evidence of any such incident, and neither counsel even mentioned a third incident at any point during the trial. Dekalb's belated attempt to cast the cited question and response as a prosecutorial failure to correct testimony actually or constructively known to be false (see *Napue v. Illinois* (1959) 360 U.S. 264, 269-270 ["a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction"]) is unconvincing. Moreover, any purported error was forfeited (to be clear, we find none) by defense counsel's failure to object and seek clarification, and on this record there is no reasonable possibility the omission affected the verdict. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Pope* (1979) 23 Cal.3d 412, 425.)

## V. Cumulative Error

Dekalb argues the cumulative effect of the alleged errors requires reversal of the judgment. We have rejected these arguments. Dekalb was entitled to a trial "in which

[5] The Attorney General is mistaken in suggesting the jury was present for this testimony.

his guilt or innocence was fairly adjudicated." (*People v. Hill, supra,* 17 Cal.4th at p. 844.) He received such a trial.

## DISPOSITION

The judgment is affirmed.

_____
Siggins, P.J.

WE CONCUR:

_____
Jenkins, J.

_____
Petrou, J.